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Item 5 of the agenda
Taking forward multilateral nuclear disarmament negotiations

Filling the legal gap for the prohibition of nuclear weapons

Submitted by Article 36 and the Women's International League for Peace and Freedom[2]

1. At the December 2014 Conference on the Humanitarian Impact on Nuclear Weapons in Vienna, Austria made a pledge calling on "all states parties to the NPT to renew their commitment to Article VI [of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)], and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons."[3]

2. The key "legal gap" that needs to be filled is the explicit prohibition of nuclear weapons and establishment of a framework for their elimination. The other weapons of mass destruction, biological and chemical weapons, are prohibited and subject to elimination processes through international legal instruments. It is past time that nuclear weapons are put on the same legal footing.

3. The "legal gap" regarding prohibition and elimination arises from various deficits in the regulation of activities involving nuclear weapons, as currently codified. This includes legal deficits regarding the development, production, testing, transfer, acquisition, transit, stockpiling, deployment, threat of use or use of nuclear weapons, as well as assistance, financing, encouragement, or inducement of these activities. The current international legal regulation of nuclear weapons is fragmentary, with several instruments covering only certain areas or activities. The legal gap also arises because the rules in the existing instruments on nuclear weapons apply to different states in different ways. Thus what is

[1] Established pursuant to resolution 70/33 of the General Assembly of the United Nations.

[2] This working paper was originally published by Article 36 and the Women's International League for Peace and Freedom in April 2015 as a table overleaf entitled: Filling the legal gap: the prohibition of nuclear weapons. It is available at http://www.reachingcriticalwill.org/images/documents/Publications/filling-the-legal-gap.pdf.

[3] See the text of the Pledge at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/Austrian_Pledge.pdf.

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needed is a comprehensive instrument that prohibits all activities involving nuclear weapons in all circumstances for all states parties.

4. The table overleaf summarises the gaps in existing treaty law related to nuclear weapons. A treaty banning nuclear weapons, by categorically prohibiting nuclear weapons and establishing a framework and impetus for their elimination, would help to fill these gaps. Such a treaty would build on existing norms and reinforce existing legal instruments, but it would also close loopholes in the current legal regime that enable states to engage in nuclear weapon activities or otherwise to claim perceived benefit from their continued possession and deployment while purporting to promote their elimination.

5. The negotiation of a treaty banning nuclear weapons should fill the legal gap regarding the prohibition of nuclear weapons by providing clear common obligations with respect to the issues outlined in the chart.[4] Whilst some aspects of the current legal framework are to be applauded, the overall patchwork of partial regulation hampers development of a clear normative recognition that nuclear weapons are unacceptable. In doing so, it facilitates retention of these weapons by certain states, which may in turn incentivize proliferation. History shows that legal prohibitions of weapon systems—their possession as well as their use—facilitate their elimination. Weapons that have been outlawed increasingly become seen as illegitimate. They lose their political status and, along with it, the money and resources for their production, modernisation, proliferation, and perpetuation. Even if nuclear-armed states do not join initially, a treaty banning nuclear weapons would have a significant normative and practical impact.

6. States should commence negotiations in 2015 on a treaty banning nuclear weapons as an effective measure for nuclear disarmament. At a time when the nuclear-armed states continue to demonstrate their lack of commitment to pursuing tangible, good faith nuclear disarmament, as international tensions rise, and as the potential for accidents persists, banning nuclear weapons is an urgent necessity.

[4] See "A treaty banning nuclear weapons: developing a legal framework prohibition and elimination of nuclear weapons," Article 36 and Reaching Critical Will, April 2014, http://www.reachingcriticalwill.org/images/documents/Publications/a-treaty-banning-nuclear-weapons.pdf.

	Existing law		
Prohibitions or obligations	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	*Gaps in existing law*
Development, production, manufacture	• All nuclear-weapon-free zone treaties ban the production of nuclear weapons. Three explicitly prohibit the development of nuclear weapons (treaties of Bangkok, Pelindaba, Semipalatinsk).	• NPT article I prohibits non-nuclear-armed states parties from producing or receiving assistance to manufacture nuclear weapons. • NPT article II prevents nuclear-armed states parties from assisting, encouraging, or inducing non-nuclear-armed states parties to manufacture nuclear weapons.	• NPT articles I and II only make nuclear weapons manufacture illegal for non-nuclear-armed states parties; there is no comprehensive prohibition. • NPT nuclear-armed states are not prohibited to assist each other in the production of nuclear weapons. • NPT non-nuclear-armed states parties are not prohibited from assisting nuclear-armed states parties in the manufacture and acquisition of nuclear weapons. • Only the production of a fully assembled nuclear weapon is explicitly prohibited by the NPT. • There is no specific provision to prohibit nuclear weapon modernisation, including developing or "improving" the weapon systems' capacities, in the NPT (though it runs counter to all reasonable interpretations of article VI).

[5] Five nuclear-weapon-free zone treaties cover 115 countries (60 per cent of Member States of the United Nations); Mongolia has separately declared itself a nuclear weapon free zone. Some states have also outlawed nuclear weapons in their constitutions or domestic legislation. The five nuclear-weapon-free zone treaties are: Tlatelolco (covering Latin America and Caribbean nuclear-weapon-free zone), Rarotonga (South Pacific), Pelindaba (Africa), Bangkok (Southeast Asia), and Semipalatinsk (Central Asia). For a comparative analysis of legal obligations arising under nuclear-weapon-free zone treaties, which informs this table, see "Nuclear Weapon Free Zones and Banning Nuclear Weapons," Article 36, April 2014, http://www.article36.org/?p=684.

	Existing law		
Prohibitions or obligations	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	*Gaps in existing law*
Testing	• All nuclear-weapon-free zone treaties ban nuclear weapon testing by States parties. • Additional protocols to the Pelindaba and Rarotonga treaties prohibit nuclear testing by NPT nuclear-armed states within the nuclear-weapon-free zones, where ratified.6	• The Partial Test Ban Treaty prohibits all nuclear explosions in the atmosphere, outer space, and underwater. • The Antarctic Treaty prohibits nuclear explosions and the disposal of radioactive waste in Antarctica. • The Comprehensive Nuclear Test Ban Treaty (CTBT) prohibits all nuclear test explosions. • States' obligations to respect the right to health entail a duty to refrain from nuclear testing where this would involve "the release of substances harmful to human health."[7] • Under international environmental law, nuclear-armed states are duty-bound to prevent, minimise, and control the risk of causing significant transboundary harm. The detonation of a nuclear weapon would cause harm that would most likely not be contained to national borders and that will in many cases be irreversible.[8]	• The CTBT has not entered into force due to the non-accession of certain states listed in annex II of the Treaty.[9] • The CTBT does not explicitly prohibit subcritical or other means of non-explosive testing.

[6] China, France, Russian Federation, and the United Kingdom of Great Britain and Northern Ireland have ratified these protocols.

[7] CESCR, General Comment 14, E/C.12/2000/4, 11 August 2000, §34.

[8] See the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001) and the Commentary thereto, §§2-4. For a recent discussion, see Martina Kunz and Jorge E. Viñuales, "Environmental approaches to nuclear weapons," in Gro Nystuen et al. (Eds.), Nuclear Weapons Under International Law, Cambridge University Press, 2014.

[9] China, Democratic People's Republic of Korea, Egypt, India, Islamic Republic of Iran, Israel, Pakistan, and the United States of America.

	Existing law		
Prohibitions or obligations	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	*Gaps in existing law*
Transfer or acquisition	• All nuclear-weapon-free zone treaties prohibit the acquisition of and control over nuclear weapons by states parties.	• NPT article I prohibits nuclear-armed states parties from transferring nuclear weapons or control over them to any recipient. Article II commits non-nuclear-armed states parties not to receive any transfer of nuclear weapons or control over them. • NPT article I prohibits nuclear-armed states parties from assisting non-nuclear-armed states parties to acquire nuclear weapons. Article II commits non-nuclear-armed states parties not to acquire nuclear weapons.	• Article I prohibits the transfer of nuclear weapons, but not nuclear delivery systems. • The NPT was adopted after the US had already stationed some of its nuclear weapons in NATO countries, with the expectation that these countries would acquire "control" over their deployment in times of war. These "nuclear sharing" agreements were concluded between 1959 and 1962.[10]
Transit			• The transit of nuclear weapons is not prohibited by any treaty. All nuclear-weapon-free zone treaties except Tlatelolco have provisions enabling parties to decide individually whether to allow the transit of nuclear weapons through their territories. Under the treaty of Semipalatinsk, parties could permit the landing of aircraft carrying nuclear weapons.
Stockpiling, possession	• All nuclear-weapon-free zone treaties prohibit the	• Possession of nuclear weapons is arguably implicitly prohibited for non-	• The NPT does not prohibit the possession and stockpiling of nuclear weapons by NPT nuclear-

[10] The United States of America understanding of control, based on the United States of America Senate's interpretation that was reportedly uncontested during NPT negotiations, is that control means the independent power to use nuclear weapons. See Hon. Brian Donnelly, "The Nuclear Weapons Non-Proliferation Articles I, II and VI of the Treaty on the Non-Proliferation of Nuclear Weapons," presentation at the conference "Non-Proliferation: Point of View from Latin America and the Caribbean," Cancún, Mexico, 11–13 January 1995, http://www.opanal.org/Articles/cancun/can-Donnelly.htm.

Prohibitions or obligations	*Existing law*		*Gaps in existing law*
	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	
	possession of nuclear weapons by states parties. Four explicitly prohibit assistance with possession (Rarotonga does not). • Two NWFZ treaties explicitly prohibit stockpiling (Pelindaba and Semipalatinsk). The Treaty of Pelindaba contains an obligation to destroy and dismantle nuclear explosive devices.	nuclear-armed NPT states parties under article II's prohibition against acquisition or manufacture. • Article VI obliges all NPT states parties to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race and nuclear disarmament. As noted by the ICJ in its 1996 advisory opinion, this entails an obligation to reach agreement.[11] • There is an obligation under customary international law on all states to pursue negotiations in good faith on effective measures for the cessation of the nuclear arms race and nuclear disarmament.[12]	armed states parties. • For states that are not party to any instrument prohibiting the acquisition or development of nuclear weapons, there is no explicit prohibition on possession under treaty law.
Stationing, deployment	• All nuclear-weapon-free zone treaties prohibit stationing and installation of nuclear weapons in nuclear-weapon-free zone territories.	• The Seabed Treaty prohibits the placing of nuclear weapons on the international seabed. • The Outer Space Treaty prohibits placing any objects carrying nuclear weapons in orbit around the earth; the installation of such weapons on celestial bodies; and stationing in outer space. • The Antarctic	• The deployment of nuclear weapons is not prohibited by the NPT or by any other instrument beyond nuclear-weapon-free zone treaties. • Stockpiles of nuclear weapons are stationed on the territories of nuclear-armed states and their allies.

[11] International Court of Justice, "Reports of Judgments, Advisory Opinions and Orders: Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996," para 99, http://www.icj-cij.org/docket/files/95/7495.pdf.

[12] Dan Joyner, "The legal meaning and implications of Article VI of the Non-Proliferation Treaty", in Gro Nystuen et al. (Eds.), Nuclear Weapons Under International Law, Cambridge University Press, 2014. See also, Daniel Rietiker, "Some Thoughts on Article VI NPT and its Customary Nature," Arms Control Law, 10 June 2014, http://bit.ly/15LXJji.

	Existing law		
Prohibitions or obligations	Prohibitions or obligations in nuclear-weapon-free zone treaties[3]	Other sources of prohibitions or obligations	*Gaps in existing law*
		Treaty prohibits any measure of a military nature in Antarctica, including the stationing of nuclear weapons.	
Use and threat of use	• Three out of five nuclear-weapon-free zone treaties explicitly prohibit the use of nuclear weapons in the territories of states parties to these treaties. • Two explicitly prohibit states parties from assisting with the use of nuclear weapons (the treaties of Tlatelolco and Bangkok). • Additional protocols to all nuclear-weapon-free zone treaties prohibit NPT nuclear-armed states parties from using or threatening to use nuclear weapons within nuclear-weapon-free zones, where ratified.	• The International Court of Justice ruled in its 1996 advisory opinion on nuclear weapons by 11 votes to 3 that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[13] However, the International Court of Justice did find that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[14] • Rules of international human rights law, international environmental law, international health law, Charter of the United Nations law, and other branches of international law would also likely be violated.[15] • The use of a nuclear weapon is implicitly prohibited to non-nuclear-armed states parties to the NPT under articles I and II of	• There is no explicit treaty prohibition or universally accepted rule of customary international law on the use or threat of use of nuclear weapons. • The NPT does not prohibit its states parties (whether nuclear-armed or not) from subscribing to the doctrine of "nuclear deterrence," which requires the possibility of using nuclear weapons in certain circumstances and requires preparation and posturing for the use of nuclear weapons. • Neither the NPT nor any other agreement prohibits consultation or planning on the use of nuclear weapons; NATO's nuclear planning group involves non-nuclear-armed states and nuclear-armed states.

[13] International Court of Justice, *op. cit.*, p. 266.

[14] Ibid.

[15] "The effects of nuclear weapons under international law," Article 36, December 2014, http://www.article36.org/?p=783.

Prohibitions or obligations	*Existing law*		*Gaps in existing law*
	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	
		that Treaty, in its prohibition of such states assuming "control" (i.e. the independent power to use nuclear weapons).[16]	
Assistance with prohibited acts, including financing	• All nuclear-weapon-free zone treaties contain obligations on parties not to assist other states with acts prohibited under the treaties. Some treaties are more comprehensive in their provisions than others on the prohibitions considered in this table (development, production, testing, transfer, acquisition, transit, stockpiling, deployment, threat of use, or use).	• NPT non-nuclear-armed states parties are prohibited from receiving, and NPT nuclear-armed states parties from providing assistance, encouragement, or inducement to non-nuclear-armed states parties to develop, produce, or acquire nuclear weapons under articles I and II. • Under article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, states are legally responsible where they knowingly assist with acts that are wrongful both for themselves and the state they are assisting.	• Existing provisions on assistance, encouragement, and inducement are uneven and do not apply equally to all states. • NPT nuclear-armed states parties may assist each other or states not party to the NPT in the production of nuclear weapons. • There is no explicit treaty prohibition against financing of the production, maintenance, or modernisation of nuclear weapon systems. Companies in non-nuclear-armed states are currently contributing to the modernisation of nuclear arsenals.
Rights and restoration		• A range of international rules and regulations describe the rights of victims and survivors of violence with regards to assistance, redress, and justice, and the restoration of affected environments. Sources include international human rights law, international humanitarian law, the Convention on the	• There is no international legal instrument that provides a framework for victims and survivors of nuclear weapons to collectively seek assistance towards the full realisation of their rights.[18] • There are no specific international obligations to engage in efforts to decontaminate or remediate areas affected by nuclear weapon

[16] See Hon. Brian Donnelly, *op. cit.*

[18] See "'Victim assistance' in a treaty banning nuclear weapons", Article 36, January 2015, http://www.article36.org/?p=834.

	Existing law		
Prohibitions or obligations	Prohibitions or obligations in nuclear-weapon-free zone treaties[5]	Other sources of prohibitions or obligations	*Gaps in existing law*
		Rights of Persons with Disabilities, transitional justice and international criminal justice standards, rules on state responsibility, and international environmental law standards.[17]	detonations, whether through testing, use, or production.

[17] See for example "Writing the Rights: Highlighting the international standards on the rights of victims of armed violence", Action on Armed Violence, March 2014, http://aoav.org.uk/wp-content/uploads/2014/02/AOAV-Writing-the-Rights.v2.2014.pdf.